No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO, INC.,
Petitioner,

v.

RICKY HASBROUCK, d/b/a Rick's Texaco, *et al.*
Respondents.

MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER TEXACO, INC.

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Dated: August 3, 1989

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MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER TEXACO, INC.

Pursuant to Supreme Court Rule 36.3, the National Association of Convenience Stores (NACS) and the Society of Independent Gasoline Marketers of America (SIGMA) move for leave to file an *amici curiae* brief in support of petitioner Texaco, Inc. The consent of the parties to the filing of this brief has been sought. Respondents Ricky Hasbrouck *et al.* did not grant their consent.

This Court previously granted the motion of SIGMA and NACS for leave to file an *amici curiae* brief in support of Texaco, Inc.'s petition for a writ of certiorari. *Texaco, Inc. v. Hasbrouck*, 109 S.Ct. 46 (1988) (order granting motion to file brief as *amici curiae*).

SIGMA is a national trade association of 315 independent marketers of motor fuels. Last year, SIGMA members sold nearly 17 percent of the motor fuels sold in the United States. Seventy-nine percent of SIGMA's members are engaged in wholesaling, and 92 percent are engaged in retail marketing. SIGMA members own and operate approximately 11,000 branded and unbranded retail outlets. They also supply product to 13,700 retail outlets owned by others.

NACS is the national trade association of the convenience store industry. Its 1,338 members operate over 57,000 stores in all 50 states. Approximately 60 percent of NACS' members sell gasoline. Many NACS members are also engaged in wholesale operations.

If allowed to stand, the decision below would have a substantial adverse impact on the industries represented by SIGMA and NACS. The court of appeals held that a longstanding pricing practice, the granting of functional discounts to middlemen in the distribution chain, may give rise to liability under the Robinson-Patman Act if the discounts injure non-competing direct-purchasing retailers. As wholesalers, the members of SIGMA and NACS could not resell profitably to retailers if their suppliers charged them the same prices that they charged direct-buying retailers. Nor would SIGMA and NACS members have any incentive to perform distributive functions if they received discounts which precisely matched their costs, leaving no profit margin.

The decision below held that functional discounts granted to wholesalers may violate Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), if they are not cost-based and if a wholesaler passes on all or part of the discount to independently owned and operated retail outlets. As is fully set forth in Texaco's brief, this ruling has no support in prior decisions of this Court and conflicts with a substantial body of precedent holding that it is not unlawful for manufacturers to sell at lower prices to wholesalers than to non-competing retailers, provided the wholesalers make their own resale pricing decisions. To avoid liability under the standard developed by the court below, manufacturers would be required to administer cost-based discount systems, but that would be completely impractical. The decision below would discourage efficient marketing and would result in the elimination of the independent wholesaling segment of the motor fuels industry, which provides strong

price and service competition for the major oil companies.

SIGMA and NACS are more familiar than either party with some of the important practical issues raised by the decision below. SIGMA and NACS are better situated than the parties to explain why it is unreasonable to ask independent marketers to share detailed cost information with their suppliers, which are often also their competitors. SIGMA and NACS are also in a better position than the parties to explain the many factors that affect wholesalers' costs and to show why it would be impractical for refiner-suppliers to administer a cost-based discount system.

SIGMA and NACS believe that the decision below will result in the elimination of wholesaler discounts, which are critical to their members' ability to compete. With respect, the effect of the decision below on independent motor fuels marketers would be more immediately felt, and is better understood, by SIGMA and NACS than the parties.

The proposed brief of SIGMA and NACS is attached.

Respectfully submitted,

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BRIEF OF AMICI CURIAE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF PETITIONER TEXACO, INC.

The Society of Independent Gasoline Marketers of America (SIGMA) and the National Association of Convenience Stores (NACS) respectfully submit this *amici curiae* brief in support of petitioner Texaco, Inc.

INTEREST OF AMICI CURIAE

The Society of Independent Gasoline Marketers of America is a national trade association representing independent marketers of motor fuels. SIGMA's 315 members sell refined petroleum products in all 50 states. In 1988 SIGMA members sold 22.7 billion gallons of fuel, which represented almost 17 percent of the motor fuel sold in the United States. SIGMA members directly own and operate 11,000 branded and unbranded retail outlets. In addition, three out of every four SIGMA members have wholesale operations. SIGMA members supply branded and unbranded petroleum products to 13,700 retail outlets owned by other companies.

The National Association of Convenience Stores is the national representative of the convenience store industry. The 1,338 members of NACS operate over 57,000 convenience stores, approximately 60 percent of which sell gasoline. Many NACS members are also engaged in gasoline wholesaling, supplying branded and unbranded retail outlets.

The members of NACS and SIGMA are independent marketers. Their primary sources of supply are the major oil companies and independent refiners, although they also purchase product from small refiners and jobbers, and on the spot market. Stringent cost control and innovative marketing techniques are hallmarks of the independent segment of the motor fuels industry. Superior efficiency enables SIGMA and NACS members to compete aggressively against the major oil companies; indeed, the independent marketing segment of the motor fuels industry is acknowledged to be "the most competitive factor in the industry at the wholesale and retail levels." *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 383 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

It is customary for the refiner-suppliers to grant graduated discounts—functional discounts—to their customers according to their level in the distribution chain, with the distributors at the level nearest the refiners paying the lowest price and retailers, who are the last link in the distribution chain before the consumer, paying the highest price. Independent distributors could not exist without functional discounts. In many markets the refiner-suppliers employ a dual distribution system, serving independent retail outlets directly and also selling to middlemen which in turn resell to independent retailers. If SIGMA and NACS members were charged the same price as direct-buying retailers, they could not profitably resell to retail outlets.

If allowed to stand, the decision below would have a substantial adverse impact on SIGMA and NACS members as well as on competition and consumers generally. The court of appeals held that Section 2(a)

of the Robinson-Patman Act, 15 U.S.C. § 13(a), may be violated where a manufacturer grants a discount to a distributor and (1) the discount exceeds the cost of the distribution functions it performs; and (2) all or a part of the discount is passed on to the distributor's customers. Under the standard announced by the court below, Texaco and other refiner-suppliers risk treble damages liability when they grant wholesaler discounts unless they match each wholesaler's discount to its costs. The court of appeals' rule is unsound as a matter of antitrust policy and business practicalities. The members of SIGMA and NACS should not be expected to reveal their distribution costs to their suppliers, which are often also their competitors, yet this would be required to ensure exact matching of costs and discounts. Moreover, if discounts were required to be no greater than the wholesaler's costs this would discourage firms from engaging in valuable wholesaling services. SIGMA and NACS members would have no incentive to incur the costs and risks associated with wholesaling, nor any incentive to achieve efficiencies in wholesaling, if they could not earn a profit on the services performed.

Because the cost-justified discount regime envisioned by the court below is completely impractical, refiner-suppliers would be left with two choices: either they must monitor and control distributors' resale prices to prevent them from passing on any part of their discount, or they must eliminate functional discounts and sell at one price to all levels of trade. The first option is obviously unacceptable, since it would expose suppliers and wholesalers to resale price maintenance claims under Section 1 of the Sherman Act. The second option, elimination of functional discounts,

would harm competition and consumers. It would force the members of SIGMA and NACS out of the wholesaling business, thereby depriving retail stations and consumers of a competitive alternative to the vertically integrated oil companies.

SUMMARY OF THE ARGUMENT

The court below held that a manufacturer may violate the Robinson-Patman Act if it charges higher prices to retailers than to non-competing wholesalers and the wholesalers pass on all or a portion of their discount to independent retailers. If allowed to stand, this decision will cause distributional inefficiency and discourage the formation and continuation of independent wholesaling businesses.

1. Texaco and other refiners of motor fuels make discounts available to wholesalers and jobbers as an incentive to perform distributional functions of value to them. Efficient wholesalers are able to keep their costs below the level of the wholesaler discount and thus earn a profit on the services they provide. The rule announced by the Ninth Circuit in this case, which requires strict equivalence between each wholesaler's costs and the size of the discount it receives, would remove the economic incentive to perform wholesaling functions and lead to greater vertical integration. The decision below, if allowed to stand, would reduce economic efficiency, eliminate a class of independent and innovative businesses, and deprive retail outlets and consumers of a competitive alternative to the major oil companies and refiners.

2. It is unrealistic and unwise as a matter of antitrust policy to expect independent marketers of motor fuels to disclose their cost data and pricing plans

to their suppliers, yet that is what would be required in order to ensure that wholesalers could not pass on any part of their discount to their customers. In many cases, independent wholesalers and jobbers are in direct competition with their suppliers. Moreover, it would be an enormous administrative burden for refiner-suppliers to match each wholesaler's discount to its costs, and this burden would discourage refiners from distributing their products through wholesalers, even though that may be the most efficient method. And, even if manufacturers were willing to administer a cost-based discount system, the resulting discrimination among competing wholesalers might violate Section 2(a).

3. It has been suggested that the decision below might stand for the proposition that the Robinson-Patman Act may be violated only where a manufacturer has actual knowledge that its wholesaler discounts are being passed through to retailers. *See* Brief for the United States as Amicus Curiae, *Texaco, Inc. v. Hasbrouck*, No. 87-2048 (U.S. May, 1989), at 12-13 (hereinafter "U.S. Br."). Addition of an "actual knowledge" element to the liability standard announced by the court below would not correct its defects; it would only cause an upsurge in price complaints and meritless Robinson-Patman claims.

ARGUMENT

I. THE DECISION BELOW WILL CAUSE DISTRIBUTIONAL INEFFICIENCIES, HARM SMALL COMPETITORS, AND DIMINISH CONSUMER WELFARE.

The motor fuels distribution system in this country is complex and constantly evolving. Historically, the distribution system could be viewed as a pyramid,

with a few dozen oil companies and independent refineries at the apex and many thousands of chain retailers and independent service station dealers at the base. Independent wholesalers and jobbers occupied intermediate levels in the pyramid. The oil companies and independent refiners have long relied on wholesalers and jobbers to distribute their products to retail outlets, especially those in rural areas and small towns.

The petroleum industry, like the rest of the economy, is not static. In many markets the major oil companies and refiners now market through two distribution channels; *i.e.*, they sell through company-owned retail stations and/or direct-supplied independent stations, as well as through independent branded wholesalers. That independent wholesalers continue to exist and, indeed, thrive in competition with their suppliers is attributable to their ability to operate more efficiently and with lower overhead costs than the refiner-suppliers. But no matter how efficient they are, independent wholesalers cannot operate at a profit unless they can buy product at lower prices than direct-buying retail outlets.

The decision below would require manufacturers which grant wholesaler discounts either to match them precisely to the wholesalers' costs or control the wholesalers' resale prices. This rule rests on the mistaken premise that the sole purpose of wholesaler discounts is to offset the costs incurred by wholesalers in performing functions which are not performed by direct-purchasing retailers. Such functions include bulk storage, transport and delivery of product, extension of credit to retailers, and provision of promotional assistance to retailers. Wholesaler discounts must do

more than cover the costs of performing these functions; they must also provide the economic incentive for businesses to perform distributive services. No rational business would make the capital investments and take on the burdens and risks of wholesaling unless it had a reasonable likelihood of earning a profit on the services performed. Moreover, businesses presently engaged in wholesaling would have no incentive to be efficient if they knew they could not earn a profit on the distributive services, or if they knew that they would not be allowed to pass on any of their discount in order to increase market share.[1]

The oil companies and independent refiners distribute their products through middlemen because they have determined that this is more cost-effective than complete vertical integration. Independent wholesalers continue to exist and thrive in areas where their suppliers also sell directly to retail outlets because of their superior efficiency. The decision below will encourage manufacturers to become totally vertically integrated, if they are able, and will discourage cost cutting by wholesalers; thus, it clearly will cause distribution to be less efficient.

[1] The lower court's cost/discount equivalence rule would have the perverse effect of rewarding the least efficient wholesalers with the largest discounts. In rejecting a rule that would have based the size of permissible wholesaler discounts on the wholesaler's costs, the Federal Trade Commission pointed out that "[e]ven if the discounts accurately reflected each customer's costs, under any variable discount system the less efficient firms with higher costs would receive higher discounts—an economically unfortunate reversal of desired incentives." Boise Cascade Corp., 107 F.T.C. 76, 212 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988).

By removing all profit from wholesaling and encouraging refiners to integrate vertically, the decision below would harm independent wholesalers and jobbers. This outcome would be ironic, given that the purpose of the Robinson-Patman Act was to preserve independent wholesalers and retailers. *See generally* F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 11-23 (1962). The decision below would also harm independent retail stations and consumers. Independent retail stations look to wholesalers and jobbers as a competitive alternative to the large oil companies. Independent marketers provide strong price competition in areas where the refiner-suppliers employ dual channel marketing systems.[2] The elimination of independent wholesalers, which is inevitable if they are unable to resell at a profit after performing their distributive functions, would mean fewer choices and higher prices for retailers and consumers.

This Court has stressed the necessity of avoiding, whenever possible, constructions of the Robinson-Patman Act which conflict with the consumer welfare orientation of the other antitrust laws. *See Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979); *United States v. United States Gypsum Corp.*, 438 U.S. 422, 458 (1978). Nothing in the text or legislative history of the Robinson-Patman Act supports, much less compels, the construction adopted by the court below. The Ninth Circuit's liability standard would thwart efficient distribution and reduce competition. It should, therefore, be rejected.

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[2] *See generally Report of the Federal Trade Commission on Mergers in the Petroleum Industry* 287-90 (1982).

II. THE NINTH CIRCUIT'S REQUIREMENT THAT WHOLESALER DISCOUNTS BE COST-BASED IS IMPRACTICAL AND WOULD REQUIRE MANUFACTURERS TO DISCRIMINATE AMONG WHOLESALERS.

Under the decision below, manufacturers who grant functional discounts can be safe from Robinson-Patman Act liability only if they either tailor each wholesaler's discount to its costs or control the wholesalers' resale prices so as to prevent them from passing on any part of the discount.

It is utterly unrealistic to expect motor fuel refiners to administer a pricing scheme in which costs and discounts are always matched. Refiner-suppliers cannot know each customer's costs of wholesaling, nor would they normally know whether their customers plan to pass on part of their discount to their own customers. Independent motor fuels marketers are in competition with the refiner-suppliers.[3] The cost advantage SIGMA and NACS members enjoy over the refiner-suppliers, which is attributable to their efficiency, is absolutely critical to their survival. It would be economic suicide for the members of SIGMA and NACS to divulge, on an ongoing basis, their most sensitive financial information to their suppliers, or to share their pricing plans with them.

Even if independent wholesalers were inclined to cooperate with suppliers' efforts to monitor their costs, a cost-based discount system would be unworkable. The costs of wholesaling vary from com-

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[3] Approximately 60 percent of the members of NACS sell gasoline at retail, and 92 percent of SIGMA members have retail operations. NACS and SIGMA members own and operate both branded and unbranded retail outlets.

pany to company and are influenced by a host of factors which are within each wholesaler's discretion as an independent business. For example, a fuel wholesaler which distributes products from its own bulk terminal has different costs than one which leases a terminal; a wholesaler which transports products in its own trucks has different costs than one which uses common carriers; and a wholesaler which maintains a large, trained staff has different costs than one which does not. Other factors affecting an individual wholesaler's costs include the length of time it stores the refiner's product prior to resale; how much and what grades of product are maintained in the wholesaler's inventory; and whether and to whom the wholesaler extends credit. Some wholesalers provide marketing assistance to their customers; others do not. Finally, at any given time a wholesaler may be selling fuel that originated with more than one supplier, which would require its costs to be apportioned somehow among the various suppliers. In short, it would be enormously burdensome for refiner-suppliers to manage a cost-based discount regime. Of course, the administrative costs would ultimately be borne by the consumer.

If a manufacturer were to attempt to administer a variable discount system, it could be exposed to Robinson-Patman claims for discriminating in price among competing wholesalers. As the Federal Trade Commission has pointed out, "[a] manufacturer almost certainly could not know in detail each customer's costs to perform certain functions. Granting the different discounts based on guesses about individual customer costs could easily lead to discriminatory prices." *Boise Cascade Corp.*, 107 F.T.C. 76, 212

(1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). The statutory cost justification probably would not be available in this situation; the defense absolves price variances based on differences in the manufacturer's costs of selling to different customers, not differences in the customers' distribution costs. *See Boise Cascade Corp.*, 107 F.T.C. at 212.

Faced with the administrative burdens and legal risks associated with a system of cost-based discounts, refiner-suppliers most likely will vertically integrate (if they can) or charge the same price to all customers no matter what their level of trade. The only other way for refiner-suppliers to avoid Robinson-Patman liability would be to monitor and control their wholesalers' resale prices to ensure that no part of the discount is being passed on, but this would run afoul of the *per se* ban against resale price maintenance. *See, e.g., Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37-41 (5th Cir.) (resale price maintenance agreement established by denial of competitive allowance in retaliation for customer's failure to adhere to suggested resale prices), *cert. denied*, 409 U.S. 1077 (1972). It would be hard to blame refiners for deciding to eliminate wholesaler discounts or vertically integrate rather than navigate the legal minefield sown by the decision below.

III. THE DECISION BELOW CANNOT BE CORRECTED BY ADDING AN "ACTUAL KNOWLEDGE" ELEMENT.

In an *amicus curiae* brief, the United States suggests that the Ninth Circuit's decision might be read to contain a requirement that the manufacturer had "actual knowledge" that a middleman had passed on part of its discount before it could be held liable. U.S. Br. 12-13. The Ninth Circuit's explicit holding con-

tained no such limitation, but if the court of appeals had included an "actual knowledge" element in its liability standard, that standard would still be erroneous.

The United States suggests that the decision below may have established the "rule that a supplier must mitigate the known downstream effects of a passed-through wholesaler discount." U.S. Br. 14. This formulation glosses over the question whether it is appropriate to place liability on the manufacturer where (1) it has not discriminated between competing customers; and (2) any injury to direct-buying retailers is attributable to the independent pricing decisions of wholesalers. Until the decision below, that question could be confidently answered in the negative, for the courts have recognized that "[i]f the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition." *Purolator Products, Inc. v. FTC*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968). Only where a manufacturer uses a "dummy" wholesaler to funnel discriminatory prices to retailers have manufacturers been held liable for injuries suffered by disfavored direct-buying retailers. *See, e.g.*, *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 83-84 (6th Cir. 1981). Thus, liability has always turned on whether the manufacturer exercised control over the transaction between the wholesaler and the retailer, not on its "knowledge" of the wholesaler's pricing practices.

In any event, an actual knowledge gloss would not cure the defects of the decision below. The United States acknowledges that it would be undesirable and

inefficient to put manufacturers in a position where they must either eliminate functional discounts or "tailor the discount precisely to the costs and pricing strategies of each individual wholesaler." U.S. Br. 9-10. And, of course, the United States would not condone resale price maintenance as a means of preventing the pass-through of functional discounts. But what other ways are there for a manufacturer to "mitigate" the effects of a passed-through wholesaler discount once the pass-through comes to its attention?

As this Court has pointed out, "complaints about price cutters 'are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the actions of their rivals.'" *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984). If a manufacturer's "actual knowledge" that functional discounts are being passed through were to be made the touchstone for Robinson-Patman liability, formerly routine price complaints would suddenly become critical events, requiring immediate investigation and action against any wholesalers found to be pricing "too low."

In sum, under both a literal reading of the decision below and the United States' proposed reading, manufacturers would risk treble damages liability for failing to take action against wholesalers whose efficiencies upset direct-buying retailers' notions of what constitutes a "fair" retail price. Under both the Ninth Circuit's stated approach and the United States' proposed approach, a manufacturer must either raise the price to the offending wholesalers, extract an agreement that they will raise their resale prices, or terminate them. None of these outcomes would serve antitrust policy or consumers.

CONCLUSION

For all the reasons set forth above, SIGMA and NACS agree with petitioner Texaco, Inc. that the standard of Robinson-Patman liability adopted by the court of appeals was erroneous. This Court should reject the Ninth Circuit's rule and endorse the position of the Federal Trade Commission and several other courts of appeal, which have held that manufacturers do not violate the Robinson-Patman Act when their price to retailers is higher than their price to non-competing, *bona fide* wholesalers.

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